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No. 84-2012

In the

Supreme Court of the United States

October Term 1984

MORRIS BRAND,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MORRIS BRAND,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

PRELIMINARY STATEMENT

On October 5, 1983, petitioner Morris Brand was convicted in the Supreme Court, New York County (Howard E. Bell, J.), after a non-jury trial, of Criminal Possession of Stolen Property in the First,

Second, and Third Degrees (New York Penal Law §§165.40, 165.45, 165.50). Petitioner was sentenced under New York's second felony offender statute, Penal Law §70.06, to concurrent prison terms of two to four years, one-and-a-half to three years, and six months, respectively.

By an order dated December 6, 1984, the Appellate Division, First Department, of the New York Supreme Court, unanimously affirmed the judgment of conviction. People v. Brand, 106 A.D.2d 206 (1st Dept. 1984). On April 2, 1985, the New York Court of Appeals denied petitioner's application for leave to appeal. People v. Brand, 64 N.Y.2d 1131 (1985). Petitioner began serving his sentence on June 24, 1985.

Petitioner now seeks a writ of certiorari to review the order of the Appellate Division, First Department.

STATEMENT OF THE CASE

On August 8, 1981, some 30 to 50 pieces of jewelry were stolen from the home of Elinor Deutsch. A few days later, Mrs. Deutsch saw one of the stolen pieces in a jewelry store. The piece was traced to the Magic Wheel Polishing Corporation, which was run by petitioner and his brother Isidore. On August 19, at

the behest of the police, Mrs. Deutsch visited petitioner's own store in Manhattan. He showed her 10 to 12 more pieces that had been stolen from her.

Armed with a search warrant, the police returned to petitioner's store on the following day and found approximately $300,000 worth of gold and silver pieces. In public showings held a few weeks later, owners identified more than one-third of this property. Although required by law to more entries for the purchase of these items, petitioner had not done so.

The Proceedings In The State Courts

Indictment Number 5969/81 charged petitioner and Isidore with the crimes of Criminal Possession of Stolen Property in the First, Second and Third Degrees. Petitioner was represented by Steven Cohen and Isidore by Cohen's partner, Richard Goldberg. Prior to trial Isidore, who had no previous convictions, pleaded guilty and was sentenced to probation.

Petitioner's non-jury trial commenced on January 20, 1983 before Justice Bell. Mr. Cohen was assisted by Mr. Goldberg in defending petitioner, and Isidore testified as a defense witness. On February 3, 1983, the judge found petitioner guilty on all three charges.

After trial, petitioner made a motion, pursuant to New York Criminal Procedure Law §210.40, to dismiss the indictment in the interest of justice. In his moving papers petitioner claimed that because of his age, his health problems, and those of his wife, it would be unjust to sentence him to a mandatory two years in prison. After denying the motion on September 29, 1983, Justice Bell sentenced petitioner as noted above.

In his appeal to the Appellate Division, First Department, petitioner argued inter alia that he was denied effective assistance of counsel because Mr. Goldberg, who aided in his defense, had represented Isidore in his guilty plea. Petitioner also maintained that Justice Bell should have dismissed the indictment in the interests of justice. By an order dated December 6, 1985, the Appellate Division unanimously affirmed the judgment of conviction without opinion.

On April 12, 1985, leave to appeal the order of the Appellate Division to the New York Court of Appeals was denied by Associate Judge Richard D. Simons.

The Instant Petition

Petitioner contends first that New York's second felony offender statute amounts to cruel and

inhuman punishment. In addition, petitioner argues that Messrs. Goldstein and Cohen had conflicts of interest which deprived petitioner of his right to effective assistance of counsel.

Reasons for Denying the Writ

1. Petitioner concedes that constitutional attacks on New York's second felony offender statute -- Penal Law §70.06 -- have failed repeatedly. See Dillard v. LaVallee, 559 F.2d 873, 874-75 (2nd Cir. 1977). Petitioner contends, however, that the statute, as applied to him, violates the Eighth Amendment because it contains no provision allowing the court to mitigate his sentence in light of his advanced years and accompanying illnesses.

This claim should be rejected summarily. Notably, petitioner can cite no case in which an elderly person successfully challenged a mandatory sentencing statute on the ground that he was too old to go to prison.* This is hardly surprising: if one 69

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*Petitioner's subsidiary claim -- that he is too sick to serve his sentence -- has no constitutional implications since New York provides for the removal of ill-prisoners to a hospital until they are sufficiently recovered to be returned to jail. New York Correction Law §508.

year-old were to escape punishment in this way, every other similarly-situated defendant would also have a valid claim. Although senior citizens undoubtedly are more law-abiding than other age groups, no one would suggest that they are immune from criminal process.

And here, petitioner's mandatory maximum sentence of two to four years was well deserved. Not only was his crime a very serious one involving stolen property worth more than $100,000, but he had committed his first felony only two years earlier at the age of 67.

Nor can petitioner advance his claim by referring to language drawn from capital punishment cases. This Court has stated that because a death sentence differs in kind from any sentence of imprisonment, decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of punishment in non-capital cases. And successful challenges to the proportionality of particular sentences in non-capital cases have been exceedingly rare. See Rummel v. Estelle, 445 U.S. 263, 272 (1980); Hutto v. Davis, 454 U.S. 370, 373 (1982).

2. Petitioner's claim that he was denied effective assistance of counsel by virtue of a conflict

of interest does not present any issues of merit that need be considered by this court. The question of whether petitioner's counsel, Mr. Cohen and Mr. Goldberg, made decisions at trial to petitioner's detriment because Mr. Goldstein still represented Isidore, is a factual one which should be left to the state courts.

When, as here, a defendant makes no objection to multiple representation, he must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Here, the record reflects no conflict at all.

To be sure, Isidore's lawyer, Mr. Goldstein participated at petitioner's trial. But since Isidore already had pleaded guilty and agreed to a negotiated sentence, it is unlikely that Mr. Goldstein felt any restraints in representing petitioner too. The one example cited by petitioner — Mr. Goldstein's direct examination of Isidore -- actually demonstrates the attorney's competence. Rather than attempting to minimize Isidore's role, Mr. Goldstein elicited from Isidore that he was in charge of the business and of purchasing the jewelry.

Petitioner's other allegation of conflict is that Mr. Cohen waived a jury trial just to make sure that Mr. Goldstein could participate. Once again, the record belies this claim. Petitioner's jury waiver met all the requirements of New York Criminal Procedure Law §320.10. It was signed by petitioner in person in open court and with the approval of the court. At that time Justice Bell questioned petitioner carefully about his decision to waive a jury trial in order to insure that the waiver was knowing and intelligent. Justice Bell then assured petitioner that he would decide the case "on the basis of the evidence" and not on the basis of any other information he may have learned during the proceeding. Petitioner suggests now that a jury might have acquitted a 69 year old man out of sympathy, but a jury is not supposed to decide a case out of sympathy, and the refusal of the court to do so cannot be ascribed to ineffective assistance of counsel or conflict of interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 23, 1985